No. 15397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILFORD R. BAUMGARDNER and PEARL E. BAUMGARDNER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition to Review a Decision of the Tax Court of the United States.

APPELLANTS' OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a decision of the Tax Court of the United States, findings of fact, and opinion of the Tax Court, which will be found in the Transcript of Record at pages 43 to 57. This Court has jurisdiction under the provisions of Section 7482 of the Internal Revenue Code of 1954.

Statement of the Case.

The deficiency letters were mailed to each of the taxpayers May 11, 1953. In each petition it is alleged that the proposed additional assessments for all years except 1950 and 1951 are barred by the provisions of Section

275 of the Internal Revenue Code of 1939. Respondent concedes this fact unless he proves fraud as to any year or with respect to the years 1948 and 1949 he proves that the taxpayers omitted from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the returns [Tr. p. 66].

Respondent's counsel in his opening statement stated that the respondent's case is a net worth case, and that the deficiencies and statutory notice were set up on a net worth basis, with the exception of the years 1944 and 1949, where the deficiencies were set up for specific items of unreported income [Tr. p. 67].

The parties have stipulated many facts, one of which is Exhibit 1-A, showing the assets and liabilities of petitioners during the years 1942 to 1951, inclusive. This exhibit was prepared by respondent (Stipulation of Facts, Par. 2). There is in dispute with respect to that exhibit three items:

(a) Cash on hand at the beginning and end of each year;

(b) Investment in the Beacon Cafe; and

(c) Investment in the Embassy Club.

Petitioners are husband and wife and reside in Hawthorne, California. Joint returns were filed for all years, except 1945 and 1947, for which years separate returns were filed. The issues involved relate to transactions involving only the husband and he will be referred to as "petitioner".

Petitioner, during all of the years involved, was Chief of Police of the City of Hawthorne, California. He came to California from Oklahoma in 1924, and at that time had saved $2,000 or $3,000. He went to work as a fire-

man in the Hawthorne Fire Department at a small salary and worked nights at a restaurant. He was married to petitioner wife in 1927. They have two children. He went to work for the Police Department in Hawthorne in 1930. In 1937 he became Chief of Police and occupied that position until his retirement in June, 1953, except for a short period hereinafter referred to. During the early days he worked as a motorcycle escort in motion pictures, earning $40 per day when he worked.

Mrs. Baumgardner has lived in Hawthorne since 1919, growing up and going to school there [Tr. p. 202]. She did not know how much money her husband had when they were married, but knows he had some, as she was not dependent upon his salary [Clk. Tr. p. 202].

In the early 1930's, the City of Hawthorne was in financial difficulties by reason of the fact that a substantial part of its real estate had been removed from its tax rolls because of the default of special assessment bonds. It was necessary to work out a refunding program of these bonds so that delinquent properties could be restored to the tax rolls [Clk. Tr. pp. 250-253]. The City of Hawthorne employed Crowell, Weedon & Co., a well known investment house in Los Angeles, as its fiscal agent to work out its refunding operations. Mr. Tad Travers was in charge of the Municipal Bond Department of that company and, as such, handled the refunding operations referred to [Tr. p. 250].

Mr. Travers was with Crowell, Weedon & Co. from 1932 to 1946, except for the War years. Since then he has been president of the Brookline Oil Company of California. He testified that on numerous occasions special meetings were called with the heads and members of the various departments of the City, such as the Police De-

partment, the Fire Department, the Water Department, and the Street Department, for the purpose of going over in detail the problem of the City and explaining the methods developed to refund the delinquent special assessment bonds and restore properties to the tax rolls [Tr. p. 253].

Both Crowell, Weedon & Co. and Mr. Travers bought some of these bonds. They were selling at ten to fourteen cents on the dollar, but the City was obligated to pay them off at par [Tr. pp. 251, 256]. There were some thirty or more different series of bonds and, from a buyer's standpoint, some series were preferable to others [Clk. Tr. p. 254]. The bonds were all bearer bonds and freely transferable; they were all tax exempt, and some of them were paid off at par [Tr. p. 256].

In 1933, Travers met petitioner, and he testified that in the period 1933 to 1939 there were substantial dealings in these bonds. He personally sold some of these bonds to petitioner and estimated that he sold him anywhere from $15,000 to $35,000 par value of these bonds. He also advised petitioner on various occasions which series were most desirable for him to buy. He knows personally that other employees of the City of Hawthorne were dealing in these bonds [Tr. p. 257]. Petitioner says there was very active trading in these bonds by City employees [Tr. p. 224].

During that period (1932-1939), petitioner made a profit of from $15,000 to $16,000 in buying and selling these bonds and had that amount of cash on hand at the beginning of the opening net worth period [Tr. p. 224].

From 1935 on, petitioner bought real estate and trust deeds on real estate with the monies realized from the sale of Hawthorne bonds [Tr. p. 225]. He received

rents from such real estate and interest on the trust deeds. The interest was not paid to him directly but was paid to the bank and by it credited to his savings accounts. Petitioner had no source of income during the years involved, except salary from the City, profits on the sales of real estate, rents from real estate, interest from trust deeds, and a small amount of dividends.

In the net worth statement for 1951 [Ex. 1-A] is included the amount of $673.06, alleged to be petitioner's investment in the Embassy Club, a legalized poker parlor in Gardena, California. The undisputed testimony of Mr. Archie Sneed, general partner of the Embassy Club, is to the effect that on or about January 1, 1951, he gave petitioner a 5 per cent interest in the Club at no cost. Petitioner therefore had no investment in the Club and it should not appear as an asset. In fact the respondent's evidence provided that it was not an investment and, if subject to tax at all, it is because of petitioner's distributive share of the partnership income for the period June 1, 1951, to December 31, 1951. This is based on the testimony of witness Pool, a certified public accountant, who prepared the partnership returns for the Embassy Club and mailed petitioner some time during March, 1952, a letter stating that the amount of $673.06 was his distributive share of the partnership income for that period. Petitioner did not include it in his return for 1951 for the reason that he did not receive any part of it [Tr. p. 227].

Petitioner kept no books or records and the respondent determined his net taxable income for all years except 1944 and 1949 by the net worth and expenditures method; as to 1944 and 1949 he relies on specific items of income which he alleges were omitted from the returns. The re-

spondent's opening net worth statement is in error, as it does not adequately account for beginning cash on hand in an amount not less than $12,000, and perhaps $15,000 or $16,000, realized from the purchase and sale of Hawthorne Municipal Bonds. It recognizes only the sum of $100 in each of the years 1940 to 1951, inclusive.

Petitioner was indicted in the United States District Court for the Southern District of California for alleged tax evasion for each of the years 1947 to 1951, inclusive. He was acquitted on all counts [Tr. pp. 190, 191]. In each of the petitions it is alleged that the assessment of additional income taxes for all years, except 1950 and 1951, is barred by the provisions of Section 275 of the Internal Revenue Code of 1939. Respondent concedes that all years prior to 1950 are barred by limitations unless he sustains his burden of proving fraud, except he says 1948 and 1949 are not barred if he proves petitioner has omitted from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the return.

Questions Presented.

1. Do the rules announced by the United States Supreme Court for the guidance of courts in criminal prosecutions for tax evasion under the net worth method apply to civil cases where the same method is used?

2. Has the Government sustained its burden of proof by clear and convincing evidence that the income tax returns filed by petitioners for the years involved were fraudulent and filed with intent to evade tax?

ARGUMENT.

A. The Principles Set Forth by the United States Supreme Court in the Case of Holland v. United States, 348 U. S. 121, That "Proof of a Likely Source From Which the Jury Could Reasonably Find That the Net Worth Spring" Are Not Limited to Criminal Actions but Are Equally Applicable to Cases Involving Civil Fraud Penalty or Routine Cases of Deficiency.

In the *Holland* case the Court described the net worth method as follows:

> "In a typical net worth prosecution the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, *when taken in connection with direct evidence of 'conduct, the likely result of which would be to mislead or conceal.' Spies v. United States,* 317 U. S. 492, 499." (Emphasis is added.)

The Supreme Court recognized that the use of this method was exceedingly dangerous: ". . . it is so

fraught with danger for the innocent that the courts must closely scrutinize its use. . . ." (*Holland* at p. 125), and warned strongly of the care with which trial and appellate courts should conduct themselves. Trial Courts, said the Court,

> "should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute." (*Holland* at p. 129.)

Appellate courts must also exercise the greatest of care:

> "Appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (*Holland* at p. 129.)

The decisions of the Supreme Court in the *Holland* case and its companion cases (*Friedberg v. United States,* 348 U. S. 142; *Smith v. United States,* 347 U. S. 147; and *United States v. Calderon,* 348 U. S. 160) laid down certain rules revolving around a consideration of the following questions:

1. What restrictions are there on the right to use the net worth method?
2. What proof of a starting point net worth is necescessary?
3. How far must the Government go in establishing that the increase in net worth is attributable to taxable income rather than non-taxable receipts?
4. What constitutes proof of "willfulness"?

On the starting point net worth, the Court said:

> "We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." (*Holland* at p. 132.)

On the taxable nature of the increase, the Court said:

> "Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income . . .
>
> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." (*Holland* at pp. 137-138.)

On the necessity of proving willfulness, the Court said:

> "The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule." (*Holland* at p. 139.)

In this case the respondent realized that in order to make his net worth computation effective, he had to show a probable or likely source of income other than that admitted by the taxpayer. In this attempt he produced the evidence of a prostitute and a pimp. That testimony need

not be discussed for the reason that the Tax Court, in reaching its conclusion, stated that it had not been influenced by the testimony of these two witnesses to the effect that they paid so-called "protection money" to enable them to operate a house of prostitution free from police interference [Tr. p. 56]. It may be pointed out, however, that neither of these persons testified to any protection payments to the petitioner. The unreliability of this sort of evidence is pointed out by the Fifth Circuit in *Ford v. United States,* 210 F. 2d 313 at pages 317 and 318, wherein the Court said:

> "The appellant next insists that the Court erred in admitting the testimony of Margaret Lera, who had operated a house of prostitution in Galveston since 1941. Over the defendant's objection, she testified that in 1943 she left $100 in cash 'at the defendant's office,' that starting the latter part of 1945 and continuing through May of 1947, she made regular payoffs 'to the police department' of $100 per month. The nearest she came to connecting the defendant with the payoffs was by a conversation in 1949 when she testified that defendant requested her aid in a political campaign on the ground as stated by him that 'he had been good to me through the years.' The defendant moved that her entire testimony be stricken as having no probative value. There was no sufficient proof that the defendant received the payoffs or any part of them, and a conclusion to that effect cannot be permitted to be based upon mere conjecture or suspicion. We have previously had occasion to comment on the necessity for safeguarding a defendant against the prejudice and danger inherent in this type of testimony. Montgomery v. United States, supra, 203 F. 2d at page 891. The Government insists that the testimony was relevant on the question of willful

intent and to show a possible source of income, citing United States v. Skidmore, 7 Cir., 123 F. 2d 604, 608; Tinkoff v. United States, 7 Cir., 86 F. 2d 868; and United States v. Sullivan, 2 Cir., 98 F. 2d 79. None of these cases would justify the admission in evidence of this vague kind of testimony to point the finger of suspicion at the defendant as the perpetrator of a different criminal offense and one involving moral turpitude.

"The evidence sufficiently disclosed that in the defendant's office of Chief of Police he had opportunities of receiving income from graft, payoffs, or other illegal sources. There can, of course, be no presumption that the defendant was guilty of such gross misconduct as to be the recipient of such ill gotten gains. The presumption is to the contrary. It was nevertheless within the jury's province to say whether that presumption had been overcome, or to infer that the defendant had some other source of income, from the testimony that the expenditures so far exceeded the available resources disclosed by the evidence, and from the evidence that such expenditures could not be accounted for by accumulated assets or by nontaxable receipts. But to undertake to aid the jury in this function by the admission of testimony of this woman as to payoffs with which the defendant was not shown to be connected was both erroneous and highly prejudicial."

There was no other evidence in the record indicating a likely source of taxable income.

The Special Agent, after completing an extensive investigation, called on petitioner at his office in the Police Station at Hawthorne in August of 1952, and advised him he was making a routine check of petitioner's tax

returns. He discussed matters generally with petitioner and asked if he had any records. Petitioner told him that whatever records he had were at his home and he was at liberty to go to his home and his wife would produce everything they had [Tr. p. 189]. On a later occasion he was given access to petitioner's safe deposit box [Tr. pp. 189-190]. The Special Agent's testimony as to the cooperation he received from petitioner indicates that the latter had nothing to fear from any investigation [Tr. p. 189]. At one of their meetings petitioner advised the Special Agent that he had made $15,000, $16,000 or $18,000 on the sale of municipal bonds during the thirties [Tr. p. 167]. The Special Agent went over to the City Treasurer's office and when he found no record there of petitioner's having purchased bonds, he discounted the story and made no further investigation and did not give petitioner credit for that statement [Tr. p. 198]. Accordingly he made the arbitrary determination in all of the years involved that petitioner had on hand at the beginning and end of each year only the sum of $100. These municipal bonds were bearer bonds, freely transferable from hand to hand [Tr. p. 256], but whether the agent knew this is not disclosed by the record. It is fair to assume, in the light of the cooperation the agent received from petitioner, that had he gone back to petitioner and advised him of the fact that he was not listed in the office of the City Treasurer as being the purchaser of bonds, he could have gotten the information that is disclosed by the record in this case. Petitioner realizes that this or any other Court might give very little credence to uncorroborated testimony of accumulation of cash which does not go through a taxpayer's bank account. In this case, however, the taxpayer's story is corroborated by

Mr. Ted Travers, who, during the thirties, was a partner in Crowell, Weedon & Company in Los Angeles, the company that had charge of the refunding operation of the City of Hawthorne bonds [Tr. p. 250]. Mr. Travers, at the time of trial, was president of the Brookline Oil Company of Los Angeles. He testified that he knew of his own knowledge that many of the employees of the City of Hawthorne were buying and selling bonds and that he, himself, sold some bonds to petitioner and advised him on several occasions as to what series of bonds he should buy [Tr. pp. 250, 255]. Petitioner testified that he made several thousand dollars during the thirties in the purchase and sale of these bonds. His testimony is corroborated by the man who was employed by the City of Hawthorne and was in charge of its refunding operations. The City of Hawthorne is a small city of approximately 28,000 people. Petitioner had lived there for some thirty years; had been the Chief of Police since 1937; was a 32nd degree Mason; a member of the Rotary Club for more than eighteen years, a member of the Baptist Church and the president of the Men's Brotherhood of that church. His testimony is worthy of belief.

The Tax Court believed the petitioner's testimony as corroborated by Mr. Travers and made an arbitrary determination that petitioner did have cash on hand in the amount of $5,000 on December 31, 1940, and at the end of each of the years 1941, 1942, 1943 and 1944, and that at the end of each of the taxable years thereafter he had cash in the amount of $3,000 [Tr. p. 54]. This is an arbitrary determination by the Tax Court, but in any event shows that the petitioner met his burden of proof as to the cash on hand at the beginning of the taxable period and that the net worth computation relied upon by the respondent is erroneous.

Upon briefs before the Tax Court the principal case relied upon by the Government was that of *Constantine Thomas,* Tax Court Memo. 1955-46, which was a net worth case tried by the same judge that tried the case at bar. On appeal the *Thomas* case was reversed by the Court of Appeals for the First Circuit. See *Thomas v. Commissioner,* 232 F. 2d 520. The Court rejected the Commissioner's contention that the taxpayer's corporation was a possible source of taxable income to account for his increases in net worth. It held that there had to be some independent showing that the corporation might be the source of the unreported income, not merely a negative inference arising from prior assumptions that the increases were taxable, and therefore must derive from the corporation, since no other taxable source was apparent. The Government did not request certiorari in this case.

In *United States v. Ford,* 237 F. 2d 57 (C. A. 2d, 1956), the Court, in a prosecution for willful invasion of income taxes based upon the net worth method, held that evidence showing the means by which the Government determined opening net worth, without including any credit for currency on hand, presented a jury question as to whether such determination made evidence of net worth so unreliable as to lack any probity as foundation for calculation of unreported income, the Court holding apparently that proof of a likely source was not needed—that it was sufficient to prove some source without proof of any particular probable source. Judge Frank dissented. The Supreme Court granted taxpayer's petition for writ of certiorari February 25, 1957.

In *Massei v. United States,* 247 F. 2d 895 (C. A. 1st, 1957), the First Circuit had before it a prosecution for

willful invasion of income taxes which involved the use of the net worth method. The Court of Appeals reversed. At the Government's request, the Supreme Court has granted certiorari in this case.

B. The Government Failed to Sustain Its Burden of Proof by Clear and Convincing Evidence That the Income Tax Returns Filed by Petitioners for Any of the Years Involved Were Fraudulent and Filed With Intent to Evade Tax.

In the opening statement of respondent's counsel, he set forth the evidence he expected to offer to prove fraud. He said:

> "In addition to the evidence of net worth, the Respondent will also introduce evidence in his opinion, which will show fraud. We expect to show that the Petitioners had little or no cash on hand at the beginning of the net worth period, the starting point. We expect to introduce evidence that will indicate a course of conduct in the earlier years which is inconsistent with the large cash hoard.
>
> "We further expect to introduce evidence showing the concealment of assets, the omission of income from the return, and omission of rental income, dividend income, interest income and income from a bar and restaurant, a poker club.
>
> "We will also show the unreporting of capital gain and concealment of income items from the accountant preparing the returns." [Tr. p. 68.]

As to the cash on hand, the Tax Court found against respondent. He determined that petitioner had cash on hand at the end of each of the taxable years of $100. On the other hand, the Tax Court found that he had cash in the amount of $5,000 on December 31, 1940, and at

the end of each of the years 1941, 1942, 1943 and 1944, and that at the end of each of the taxable years thereafter he had cash in the amount of $3,000.

As to the petitioner's conduct in earlier years, the evidence showed that in 1938 he applied to the bank for a $200 loan to take a vacation trip, and on his application for said loan he showed an obligatoin to a department store which was being paid off in monthly installments and one to a furniture company. On his application he listed no other source of income other than from the Police Department. In January of 1939, he negotiated a loan for $480 to refinance a used car, agreeing to make payments of $32 per month. He listed as his only source of income his salary from the Police Department. An examination of his bank accounts showed little activity, with no large balances and no large deposits or withdrawals during the years 1940 to 1944 [Tr. pp. 46-47]. Although the Special Agent had been told by petitioner that he had invested in Hawthorne municipal bonds and made substantial amounts, the Agent gave him no credit for his statement when he did not find petitioner's name listed as a purchaser on the records of the City Treasurer [Tr. p. 198]. The Tax Court, however, said:

> "We are willing to believe that petitioner did invest in these bonds which at the time sold for as little as ten to fourteen cents on the dollar. His testimony in this respect is corroborated by the witness Travers who was in charge of the Municipal Bond Department of a Los Angeles investment firm which dealt in the Hawthorne bonds." [Tr. p. 53.]

On this basis the Tax Court made an arbitrary determination of cash on hand at the beginning of the net worth period, which was fifty times larger than that determined by the respondent.

With respect to the alleged income from a bar and restaurant, the respondent sought to show that petitioner was a silent partner owning fifty per cent in a restaurant known as the Beacon Cafe. The value of this interest was included by respondent in petitioner's net worth statement at some $16,000. The Tax Court found as a fact that the petitioner had no interest in this cafe and eliminated it as an asset in the net worth computation [Tr. p. 54].

With respect to the alleged income from a poker club which was known as the Embassy Club, in the City of Gardena, California, there is no dispute about the fact that petitioner became a five per cent owner in January, 1951, by a gift from one of the general partners. On December 31, 1951, there was a balance of $673.06 in petitioner's capital account in the Club, and in March of 1952 the accountant for the Club wrote petitioner a letter showing the amount of his distributive share of partnership income which he said should have been reported for income tax purposes to be $1,164.54. Petitioner says he did not report that or any other amount from the Club for the simple reason that he did not receive any income. Assuming that he should have reported it, the reason for not doing so would seem to be a valid reason, and certainly his failure to report that amount when he did not receive it does not prove that the omission was fraudulent.

With respect to concealment of assets, suffice it to say that there is just no evidence of such concealment. All of petitioner's assets shown in the net worth statement consisted of real estate standing in the name of himself and his wife.

In respect to the reporting of capital gain, there is no claim that the petitioner sold property and did not report a profit. Respondent's only claim is that he did not report

sufficient profit. For example, in the year 1945, the respondent determined a long-term capital gain of $2,679.52 instead of $1,128.50, reported on the return. Obviously the respondent took the difference between the original cost and the sales price. Petitioner testified that during the time he held the property he made capital improvements to it. He had kept no records and his estimate of capital improvements was purely an estimate, but he described the nature of the improvements and gave his estimate as to the probable cost thereof [Tr. p. 15]. The same is true of the capital gain profits in 1942 [Tr. p. 45]. In 1946, for example, petitioner reported a short-term capital gain of $1,500, whereas the respondent determined it was a long-term capital gain of $1,002.02. The respondent decreased the amount of profit on that sale [Tr. p. 27]. In 1950, the respondent allowed additional miscellaneous deductions of $1,728.11 which the taxpayer had not claimed. They were for contributions, interest, taxes, and legal fees [Tr. p. 30], and for the year 1951 the respondent allowed additional deductions for real and personal property taxes and legal fees which had not been claimed as deductions. Obviously the petitioner's failure to keep adequate records operated in many instances to his own disadvantage.

The amount of dividend income alleged to have been unreported during the years ranged from $12.50 to $50 per year. The interest income received during the years and alleged to have been unreported is set forth in the findings [Tr. p. 48]. The interest income was not paid directly to petitioner, but was credited to his real estate account in the Bank of America at Hawthorne, where the debtor made payments of principal and interest on the trust deeds. During the years 1947, 1948, and 1949, petitioner reported, in addition to his salary, "commis-

sions" in the amounts of $2,000, $3,000, and $6,000, respectively. He testified that in reporting these amounts, he had intended to include all items of income other than his salary, including dividends and interest.

> Fraud means actual intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing. The proof must be by fair preponderance of the evidence which is clear and convincing. (*Wickham v. Commissioner,* 65 F. 2d 527.)

The proof of fraud must be more than suggestive, and the Commissioner's burden is substantial, where the claim is first made long after the taxable year. The deficiency letters in these cases covering the years involved were sent to petitioner May 11, 1953. For all of the years involved, except the years 1945 and 1947, petitioner and his wife filed joint returns. Had he been attempting to minimize his tax, a substantial saving would have resulted had he and his wife filed separate community returns. Moreover, the fact that petitioner omitted legal deductions is some evidence that any alleged omissions of income was careless, rather than fraudulent.

Conclusion.

For the foregoing reasons,

(1) The petitioner asks that the decision of the Tax Court ordering that there are deficiencies in income tax and penalties for the years involved should be reversed.

(2) In the alternative the petitioner asks that the decision of the Tax Court ordering that there are penalties for the years involved be reversed and the case remanded to the Tax Court for further proceedings on the issue of whether or not there are deficiencies.

Respectfully submitted,

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